PD-1299-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/6/2017 10:51:34 AM
Accepted 2/6/2017 11:00:06 AM
ABEL ACOSTA
CLERK

**No. PD-1299-16**

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
2/6/2017
ABEL ACOSTA, CLERK

**THE STATE OF TEXAS,**
**PETITIONER,**

**v.**

**KIMBERLY FORD,**
**RESPONDENT.**

ON PDR FROM THE THIRTEENTH
COURT OF APPEALS

# PETITIONER'S BRIEF

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)
douglas.norman@nuecesco.com

Attorney for Petitioner

## IDENTITY OF PARTIES AND ATTORNEYS

State's Trial Attorney:

Ms. Michelle Putman
Assistant District Attorney
901 Leopard, Room 206
Corpus Christi, Texas 78401

State's Appellate Attorney:

Mr. A. Cliff Gordon
Mr. Douglas K. Norman
Assistant District Attorneys
901 Leopard, Room 206
Corpus Christi, Texas 78401

Respondent:

Ms. Kimberly Ford

Respondent's Trial Attorney:

Mr. Jason Wolf
410 Peoples St.
Corpus Christi, Texas 78401

Respondent's Appellate Attorney:

Ms. Irma Sanjines
P.O. Box 4005
Corpus Christi, Texas 78469

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### Cases

**Statutes & Rules**

NO. PD-1299-16
(Appellate Court Cause No. 13-15-031-CR)

| | | |
|---|---|---|
| THE STATE OF TEXAS, Petitioner, | § | IN THE |
| V. | § | COURT OF CRIMINAL APPEALS |
| KIMBERLY FORD, Respondent. | § | OF TEXAS |

# PETITIONER'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the District Attorney for the 105th Judicial District of Texas, and respectfully urges this Court to reverse the judgment of the Thirteenth Court of Appeals in the above named cause for the reasons that follow:

## STATEMENT OF THE CASE

On June 5, 2014, Kimberly Ford was indicted for possession of one to four grams of methamphetamine, a third degree felony. Ford filed a motion to suppress on October 7, 2014, claiming that she had been illegally detained, arrested and searched. The trial court heard and granted the motion to suppress on December 10, 2014, from which the State filed timely notice of appeal.

A panel of the Thirteenth Court of Appeals affirmed the trial court's order granting motion to suppress in an unpublished opinion on September 15, 2016. The State filed a timely motion for rehearing, which was denied on October 12, 2016. The State then timely petitioned this Court for discretionary review, which was granted on January 25, 2017.

## ISSUES PRESENTED

**I. Whether a shopper's concealing merchandise inside her purse in a shopping cart gives rise to probable cause to arrest her for theft?**

**II. Whether a Suspect's innocent but unverifiable explanation for otherwise highly suspicious conduct negates probable cause? In particular, whether a shopper's claim that she intended to pay for items concealed in her purse while shopping negates probable cause to arrest her for theft?**

## STATEMENT OF FACTS

At a hearing on motion to suppress, the facts leading up to Ford's arrest were presented through Police Officer Michael Rogers' offense report, which showed that he was responding to a Dollar General store in Corpus Christi, Texas, in reference to an employee's report that a customer in the store was concealing merchandise in her purse and jacket. The employee identified the suspect as a "white female with blond hair" wearing "blue jeans and a light blue shirt." Officer Rogers located Ford, who fit the description "exactly" and approached her. Ford asked Officer Rogers, "Can I help you?" and he told her that she had been reported for concealing items

in her purse. Ford then admitted to putting items in her purse, but said she was "not done shopping . . . and . . . was going to pay for them before she left." Officer Rogers then grabbed a jacket that was covering Ford's purse, which was located in the child's seat of Ford's shopping cart. Ford's purse was "zipped up and full of store merchandise." Ford had other merchandise inside of the shopping cart that had not been concealed. Officer Rogers then placed Ford under arrest for theft and, while removing the merchandise from Ford's purse, identified "six small zipper type baggies" containing a crystal-like substance which Officer Rogers believed to be methamphetamine.

The trial court granted the motion to suppress, and made findings of fact, which merely stated that Ford was still shopping, had not left the store, and had not passed the checkout area when stopped by Officer Rogers, but did not address the State's theory of probable cause based on Ford's admitted concealment of merchandise in her purse.

## SUMMARY OF THE ARGUMENT

*Issue No. 1* – When a shopper conceals merchandise inside her purse in a shopping cart, her exercise of control over that merchandise exceeds the limited right of control granted by the merchant to shoppers at a self-service store and demonstrates an intent to deprive the merchant of his property, which is sufficient to show not only probable cause but a completed theft.

*Issue No. 2* – The shopper's claim, upon being caught, that she intended to pay for such merchandise does not negate the circumstances suggesting otherwise or eliminate probable cause to arrest her for theft.

## ARGUMENT

### I. Whether a shopper's concealing merchandise inside her purse in a shopping cart gives rise to probable cause to arrest her for theft?

Before Officer Rogers arrested Kimberly Ford in the present case, it is undisputed that she had already admitted to placing merchandise in her purse, which was zipped up and covered by a jacket in her shopping cart. Yet, the Thirteenth Court of Appeals held that Officer Rogers lacked probable cause to arrest Ford for theft, which, as a result, rendered unlawful the search of Ford's purse incident to that arrest.

### A. Standard of Review.

In reviewing a trial court's ruling on a motion to suppress, appellate courts employ a bifurcated standard, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a *de novo* standard of review to pure questions of law and mixed questions that do not depend on credibility determinations. *E.g.*, *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). Whether a specific search or seizure is reasonable

or supported by probable cause under the Fourth Amendment is subject to *de novo* review. *E.g., Dixon v. State*, 206 S.W.3d 613, 616 (Tex. Crim. App. 2006).

**B. Probable Cause.**

To effectuate a full custodial arrest, an officer must have probable cause to believe the person arrested has committed or is committing an offense. Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe an offense has been or is being committed. *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). A finding of probable cause requires "more than bare suspicion" but "less than ... would justify ... conviction." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302 (1949)). When determining probable cause, courts look to the totality of the circumstances. *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007).

**C. Theft.**

A person commits theft if she unlawfully appropriates property with the intent to deprive the owner of the property. Tex. Penal Code § 31.03(a).

Appropriation may be accomplished by exercising control over the property in question. Tex. Penal Code § 31.01(4)(B). Such appropriation is unlawful if it is without the owner's effective consent. Tex. Penal Code § 31.03(b)(1).

For purposes of the appropriation and control element of theft, this Court has held that "[r]emoval of the object from its customary location is sufficient to show such reduction to the control or manual possession as is required." *Baker v. State*, 511 S.W.2d 272 (Tex. Crim. App. 1974). Accordingly, asportation, or taking the property off the premises, is not essential as long as the requisite control has been exercised over the property, coupled with an intent to deprive the owner of the property. *Hill v. State*, 633 S.W.2d 520, 521 (Tex. Crim. App. 1981); *see also Edwards v. State*, 440 S.W.2d 648, 649 (Tex. Crim. App. 1969) ("[A]sportation of the property is not necessary to the crime of theft"). In particular, in *Hill*, this Court held that "the State's proof that appellant [a customer at a gun store] placed one of the pistols under his shirt [justified] finding an exercise of control over the alleged property with an intent to deprive, sufficient to support those elements of the offense." 633 S.W.2d at 521.

Accordingly, what distinguishes theft from ordinary shopping is the lack of intent to pay for the items selected and the lack of consent of the

owner to control the property in a manner inconsistent with the owner's greater rights.

As this Court found in *Hill*, concealment of the property in question justifies a finding not only of control, but of intent to deprive the owner of that property. This is a rational inference, especially considering that there is no reason to carry and conceal the merchandise in a purse because the shopping cart is provided for the purpose of carrying those items, and because the same merchandise would have to be taken out of the purse at the checkout if it is being carried for the legitimate purpose of purchasing it. There is simply no obvious reason to place items inside the purse other than to conceal and steal them.

In addition, implicit in *Hill* is the additional finding that the owner of the merchandise does not consent to a customer's control of that merchandise, even while still in the store, when the customer has no intent to purchase the merchandise but rather intends to steal it from the store.

In the context of a retail self-service store, it is common knowledge and practice that customers are allowed a limited right of control over the merchandise they select, for the purpose of carrying such items around the store until they reach the checkout to pay for those items. That is the whole purpose of providing shopping carts for customers to use. As long as the

customer intends to comply with this limited right and not take the items out of the store without paying for them, he or she has not exceeded the limited right of control that is implicitly granted to all customers. However, a customer's malicious intent to steal the merchandise in question negates the implied consent of the owner to allow this limited right of control.

By analogy, in the context of a burglary, this Court has held that the implied consent of an owner for entry onto premises generally open to the public for lawful purposes does not extend to entry for an unlawful purpose such as theft, even when the entry is accomplished during normal business hours. *See Thommen v. State,* 505 S.W.2d 900 (Tex. Crim. App.1974); *Trevino v. State,* 254 S.W.2d 788 (Tex. Crim. App. 1953) (opinion on rehearing).

**D. Out-of-State Authority.**

Other jurisdictions as well have attempted to define the line between the implied right of a customer to control merchandise while still shopping in a "self-service" store, and acts that fall outside that implied right and are inconsistent with the greater rights of the merchant prior to actual sale and transfer of ownership.

A federal court in the District of Columbia long ago recognized that:

> By this system of merchandising [in a self-service store] the patron is invited to select and take possession of the commodities he intends to

> purchase. Mere possession of the goods, however, does not pass title to the customer and the possession is of itself conditional in character until the merchandise is taken to the cashier and payment is made.

*Groomes v.United States*, 155 A.2d 73, 75 (D.C. 1959). The New York Court of Appeals later explained this invitation, and the limits thereof, as follows:

> In stores of that type, customers are impliedly invited to examine, try on, and carry about the merchandise on display. Thus in a sense, the owner has consented to the customer's possession of the goods for a limited purpose. That the owner has consented to that possession does not, however, preclude a conviction for larceny. If the customer exercises dominion and control wholly inconsistent with the continued rights of the owner, and the other elements of the crime are present, a larceny has occurred.

*People v. Olivo*, 52 N.Y.2d 309, 420 N.E.2d 40, 43 (N.Y. 1981) (citations omitted); *see also Holguin v. Sally Beauty Supply, Inc.*, 150 N.M. 636, 264 P.3d 732, 736-37 (N.M. App. 2011); *Carter v. Commonwealth*, 280 Va. 100, 694 S.E.2d 590, 594 (Va. 2010); *Commonwealth v. Vickers*, 60 Mass. App. Ct. 24, 798 N.E.2d 575, 579 (Mass. App. 2003); *Lee v. State*, 59 Md. App. 28, 474 A.2d 537, 541 (Md. App. 1984) (recognizing the implied invitation and its limitations in similar terms). Other jurisdictions have uniformly recognized that a customer's concealment of the merchandise in question is generally sufficient to show an exercise of control inconsistent with the rights of the merchant and sufficient to support a conviction for theft. *See Vickers*, 798 N.E.2d at 579; *Lee*, 474 A.2d at 541-42 (noting that "In many

cases the determinative factor appears to be defendant's act of concealing the goods under his clothing or in a container"); *Olivo*, 420 N.E.2d at 44 (also noting that "In many cases, it will be particularly relevant that defendant concealed the goods under clothing or in a container"). In particular, in *Groomes*, the court stated:

> It is well settled that the elements of a taking and asportation are satisfied where the evidence shows that the property was taken from the owner and was concealed or put in a convenient place for removal. The fact that the possession was brief or that the person was detected before the goods could be removed from the owner's premises is immaterial.

155 A.2d at 75; *but see Holguin*, 264 P.3d at 737 (where the court required more than merely the placement of good in a "shopping bag" to infer criminal intent or show possession adverse to the interests of the store). The facts in *Groomes* are remarkably similar to those in the present case, as follows:

> The Government's evidence in this case tended to prove that appellant's actions were wholly inconsistent with those of a prospective purchaser. It was established that the items once removed from the shelf were immediately secreted in her purse. At the time, the cart used by appellant was about half full of groceries. By concealing the articles in her purse separate and apart from the other goods in the cart, appellant acquired complete and exclusive control over the property.

155 A.2d at 75.

### E. Conclusion.

Accordingly, the facts known to police in the present case at the time they arrested Ford, and searched her purse incident to that arrest, were sufficient to show a completed theft of the merchandise in question, and the Thirteenth Court of Appeals' failure to acknowledge these facts as even sufficient to make the lesser showing of probable cause flies in the face of this Court's opinion in *Hill* as well as numerous similar out-of-state shoplifting cases.

**II. Whether a Suspect's innocent but unverifiable explanation for otherwise highly suspicious conduct negates probable cause? In particular, whether a shopper's claim that she intended to pay for items concealed in her purse while shopping negates probable cause to arrest her for theft?**

Moreover, Ford's protestations, upon being caught by the police, that she intended to pay for the concealed items should not negate the common sense inference, recognized by this Court in *Hill*, that her concealment of the items tells a different story. Nor should it, *a fortiori*, negate Officer Rogers' probable cause to arrest. In other words, a customer should not be able to erase probable cause simply by asserting an innocent explanation after she has been caught concealing the items in question.

Numerous federal circuit courts have rejected the idea that a suspect's innocent explanation or defense negates otherwise valid probable cause to

arrest. *See Stonecipher v. Valles*, 759 F.3d 1134, 1146 (10th Cir. 2014); *Painter v. Robertson*, 185 F.3d 557, 571 n.21 (6th Cir. 1999); *Kuehl v. Burtis*, 173 F.3d 646, 650–51 (8th Cir. 1999); *Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir.1995); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 n. 6 (11th Cir.1990); *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988); *Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir.1986); *Linn v. Garcia*, 531 F.2d 855, 861 (8th Cir.1976). As the Second Circuit has said, "[i]t is up to the factfinder to determine whether a defendant's story holds water, not the arresting officer." *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989); *see also In re J.M.*, 995 S.W.2d 838, 843 n.7 (Tex. App.—Austin 1999, no pet.) ("The fact that an arrestee may offer exculpatory evidence to an officer that may later support a defense to criminal activity does not eliminate probable cause to arrest.").

It is true that the "totality of the circumstances" test includes a suspect's satisfactory explanation of suspicious behavior as a factor in determining whether probable cause exists, *see Miller v. Sanilac County*, 606 F.3d 240, 249 (6th Cir. 2010); *Criss*, 867 F.2d at 263, and "[a]n officer contemplating an arrest is not free to disregard plainly exculpatory evidence." *Kuehl*, 173 F.3d at 650. However this factor does not override facts which otherwise show probable cause to believe that a crime has been

committed, unless the exculpatory evidence or explanation in some way conclusively establishes the suspect's innocence. *See Kuehl*, 173 F.3d at 650–51; *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1257 (10th Cir.1998) (no probable cause to arrest plaintiff for shoplifting despite security guards' informing police that plaintiff stole merchandise, where officers viewed videotape rebutting guards' account and where plaintiff explained her actions to officers and produced receipts for the merchandise in question).

In the present case, however, Ford's claim that she intended to pay for the items she was concealing was self-serving, unverifiable, and inconsistent with her conduct in concealing them within her purse. To allow her to so easily negate probable cause for the present arrest would be tantamount to allowing every shoplifter who is caught even outside of the store to claim that she really intended to pay for the goods in question but simply forgot, and thereby avoid any arrest or consequences.

This Court should adopt the same skepticism concerning such explanations as the federal circuit courts have, at least with regard to the probable cause determination.

## PRAYER

For the foregoing reasons, the State respectfully requests that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and render judgment vacating the order of the trial court granting the motion to suppress.

Respectfully submitted,

/s/ *Douglas K. Norman*

_____

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)
douglas.norman@nuecesco.com

## RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 2,694.

/s/ *Douglas K. Norman*

_____

Douglas K. Norman

## CERTIFICATE OF SERVICE

I certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this brief were e-served on February 6, 2017, on Respondent's attorney, Ms. Irma Sanjines, at irmasanjines@aol.com**,** and on the State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov.

/s/ *Douglas K. Norman*

_____

Douglas K. Norman